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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 73-337

THE SEVEN-UP COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, LEWIS A. ENGMAN, PAUL RAND DIXON, MARY GARDNER JONES, DAVID S. DENNISON, JR., MAYO J. THOMPSON, ANDREW C. GOODHOPE, Administrative Law Judge, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, affirming dismissal of the Complaint herein.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit, dated May 31, 1973, has not yet been officially

reported; it has been reported unofficially at 1973 Trade Cases ¶ 74,528. The opinion of the district court of September 12, 1972, is reported officially at 349 F.Supp. 551, and unofficially at 1972 Trade Cases ¶ 74,204. The opinions of both courts, as well as the opinions of the Federal Trade Commission and its Administrative Law Judge denying petitioner's motion to dismiss the Federal Trade Commission's Complaint for failure to join indispensable parties are reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 31, 1973. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issue before this Court is whether, when the Federal Trade Commission has determined to conduct proceedings without the participation of persons whose substantial contract and property rights are sought to be destroyed in the proceeding and whose absence from the proceeding threatens parties thereto with inconsistent claims and multiple litigation, a district court may exercise jurisdiction to prevent the Commission from conducting such proceeding until it has joined the indispensable parties.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Constitutional provision involved here is the due process clause of the Fifth Amendment to the United States Constitution. District court jurisdiction is conferred by Sections 1331(a), 1337, 1361 and 1651 of the Judicial Code, 28 U.S.C. §§ 1331(a), 1337,

1361 and 1651, and Sections 10(c) and (e) of the Administrative Procedure Act, 5 U.S.C. §§ 704 and 706. Other relevant provisions are Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and Rule 19 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix E hereto.

STATEMENT OF THE CASE

1. Factual Background

The Seven-Up Company (hereinafter "Seven-Up") is the owner of "Seven-Up" and other trademarks used in connection with the sale of soft drink beverages and is engaged in the manufacture of extract used in the production of the Seven-Up family of soft drink beverages. Soft drink extracts manufactured by Seven-Up are sold to its bottlers, who have entered into franchise agreements with Seven-Up.

There are more than 400 bottlers franchised to bottle and sell Seven-Up trademarked soft drinks. These bottlers vary in size, although the majority of them are small, family businesses. Under the franchise agreements bottlers are made responsible for production and sale of the Seven-Up family of beverages within designated areas. The bottlers' responsibilities include production of the beverage, maintenance of quality control, regular service of the retail accounts in the area and adequate coverage of the marketing area. By reason of his making the necessary investment in plant and facilities and his carrying out his responsibilities, each bottler is awarded an exclusive franchise in his area. (19a)[1]

[1] The suffix "a" hereinafter refers to page numbers within the appendices to this petition, *infra*.

The cumulative investment of the Seven-Up bottlers amounts to hundreds of millions of dollars. (19a) The bottlers have made these sizeable investments on the expectation that under the franchise agreements they would not only be responsible for developing a certain territory and serving all the accounts therein but also that they would enjoy the benefits of whatever demand they developed in their territories. In reliance upon the franchise agreements, including the territorial provisions, hundreds of individuals have built successful local businesses and over the years have expended huge sums in plants, manufacturing facilities, and distribution systems. The small bottlers have built their businesses by developing and serving designated territories. In many cases they have obtained loans on the strength of the good will which they have established in their territory and on the expectation that their exclusive territorial right will continue. It is unquestioned, therefore, that the Seven-Up bottlers view the franchise agreements between them and plaintiff, including the territorial provisions, as valuable, and in many cases, essential assets of their business.

2. Proceedings in the Federal Trade Commission

On July 15, 1972, the Commission issued a complaint[2] charging that Seven-Up has restrained com-

[2] Similar proceedings were brought by the FTC against seven other soft drink franchise companies. Two of these, The Coca-Cola Company and PepsiCo, Inc., filed similar district court actions in the Northern District of Georgia and the Southern District of New York, respectively. Both complaints were dismissed. The Coca-Cola Company v. FTC, 342 F.Supp. 670; PepsiCo, Inc. v. FTC, 343 F.Supp. 396. These dismissals were affirmed, and petitions for certiorari have been filed in both cases. The Coca-Cola Company v. FTC, — F. 2d — (5th Cir. 1972), (1973 Trade Cases ¶ 74,360), pet. for cert. filed, May 8, 1973; PepsiCo, Inc. v. FTC, 472 F. 2d 179 (2d Cir. 1972), pet. for cert. filed April 19, 1973.

petition in the sale of soft drink beverages "by restricting its bottlers from selling outside of a designated geographic area." The proposed Order accompanying the Commission's complaint would prevent Seven-Up from entering into, or otherwise giving effect to, any agreements limiting the territories in which its bottlers may sell soft drink products. It would also bar Seven-Up from entering into any agreement which would prevent any bottler from moving his place of business into a locality already being served by an existing bottler.

The complaint named only Seven-Up as a respondent, and not its bottlers. In answering the complaint, Seven-Up objected to the Commission's failure to join the bottlers, pleading that nonjoinder of these parties who are needed for adjudication rendered the complaint fatally defective, and moved for dismissal. (19a) The Commission's trial counsel (hereinafter "complaint counsel") opposed Seven-Up's motion and contended that despite the bottlers' absence from the proceeding the bottlers would be bound by any order affecting the contracts. (19a)

The Administrative Law Judge denied Seven-Up's motion to dismiss the complaint for nonjoinder of indispensable parties. In his opinion he acknowledged the probable damaging effect upon the bottlers' interests that a rule striking down the territorial provisions would have:

> It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts . . . . To that extent,

> therefore, the bottlers may be considered indispensable. (21a)

Nevertheless, the Administrative Law Judge denied the motion to dismiss on the grounds that joinder was not "feasible" for two reasons: (1) a "presumption" that "a substantial number" of the bottlers might not be in commerce and, consequently, not subject to the Commission's jurisdiction, and (2) that joinder of Seven-Up's 470 bottlers would make a trial unmanageable. (21a) Despite his concern over the manageability of a proceeding with petitioner's bottlers participating, the Administrative Law Judge indicated he would permit any bottlers to intervene, although no attempt was made to notify the bottlers of the complaint or of the opportunity of intervention afforded them.

Seven-Up appealed to the Commission from the Hearing Examiner's ruling. Without expressly dealing with the Administrative Law Judge's reasons for denying appellee's motion to dismiss, the Commission upheld his ruling on the grounds that, even though its ultimate order might undermine the contractual relationships between respondents and third parties, the Commission's proceedings may properly disregard third parties to any contract which might be held in contravention of one of the antitrust laws. (14a) The fact that the lawfulness of the contract provisions under the antitrust laws had as yet not been determined was not held to entitle third parties to a right to participate in the proceedings in which their contract rights might be invalidated.

> It is well established, therefore, that third parties to a contract the legality of which is being chal-

lenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. (15a)

A second reason asserted by petitioner for joining the bottlers in the proceeding was that petitioner is being threatened with the prospect of multiple, inconsistent claims against it. However, the Commission concluded that petitioner had no grounds for such a fear; in the event that the contract provisions were invalidated, the bottlers, as parties to unlawful agreements, would have no enforceable rights because "supervening illegality renders a contract unenforceable even if it was legal when entered into." (16a) The Commission's decision did not attempt to show why the bottlers could not have been joined in the proceeding or demonstrate any difficulties in accomplishing joinder which would justify non-joinder of the bottlers.

On July 31, 1972, complaint counsel proposed a novel and controversial form of relief, referred to as a "Metro Area Bottler Handicap," under which, according to complaint counsel, "the larger bottlers now doing business in the 200 largest metro areas . . . for 10 years are limited to selling in metro areas and forbidden to sell in non-metro areas which such large bottlers do not presently serve . . . Thus small bottlers located adjacent to a metro area would be freed to sell into that metro area without concern that the metro bottler can retaliate by selling into the small bottlers' territory." (Memorandum by Complaint Counsel in Support of Motion for Partial Summary Decision, July 31, 1972, p. 17.)

FTC complaint counsel's proposal, if adopted, not only would destroy contract rights upon which the

bottlers have relied for years without their presence in the proceedings but also would inevitably and unnecessarily provoke conflicting claims between franchise companies and bottlers and among bottlers themselves. The full range of contract rights which might be affected by complaint counsel's proposal is not presently known, and without the participation of the bottlers the scope of the conflicting claims cannot be anticipated.

3. Proceedings in the Federal Courts Below

On May 8, 1972, Seven-Up filed a complaint in the United States District Court for the Eastern District of Missouri, requesting declaratory judgment and injunctive relief. On September 12, 1972 District Court Judge Regen dismissed the complaint and in a terse opinion ruled that the district court lacked subject matter jurisdiction, referring to the district court holdings in *The Coca-Cola Company* v. *Federal Trade Commission,* 342 F.Supp. 670 (N.D. Ga. 1972); and *PepsiCo., Inc.* v. *Federal Trade Commission,* 343 F.Supp. 396 (S.D. N.Y. 1972). (6a)

On May 31, 1973,[3] without reaching the question whether the bottlers should have been joined in the FTC proceedings as indispensable parties, the Court of Appeals for the Eighth Circuit affirmed the district court ruling that it lacked subject matter jurisdiction. (2a)

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[3] Following appeal to the Eighth Circuit, Miles W. Kirkpatrick resigned as Chairman of the Commission and A. Everette MacIntyre resigned as a member of the Commission. Lewis A. Engman, since appointed as Chairman of the Commission, and Mayo J. Thompson, since appointed a member of the Commission, have been substituted as respondents in this Court. Supreme Court Rule 48(3).

REASONS FOR GRANTING THE WRIT

This petition raises an important question concerning the authority of federal courts to intervene to remedy fundamental defects in agency proceedings. The defect here concerned is one which would vitiate the administrative proceedings in their entirety, namely, failure to join indispensable parties. Neither of the courts below reached the question whether the soft drink bottlers, whose territorial franchises would be eliminated by a judgment upholding the FTC complaint, are indispensable parties in the Commission proceedings. The courts below simply ruled that the district court lacked jurisdiction even to consider this matter. This ruling was erroneous on settled principles, since the alleged flaw in the agency's proceeding was a fundamental one, the issue presented involved a purely legal determination and the Commission's decision was final as a practical matter. The courts below clearly should have found that exercise of the district court's jurisdiction was appropriate in the circumstances of this case.

The courts below took an unreasonably narrow view of when courts may appropriately intervene to remedy invalid agency action.[4] It is well established, of course, that there are circumstances in which federal courts may properly review the claims of parties aggrieved by agency action prior to the culmination of the agency proceedings or prior to the normal process of judicial review contemplated by the particular administrative

[4] The Eighth Circuit correctly recognized that "statutory provisions for review [by a court of appeals exclusively of cease and desist orders], however, have been held not to preclude district court review under all circumstances" (App. 4a), although it failed to properly inquire whether such circumstances exist here.

scheme. *Skinner & Eddy Corp.* v. *United States,* 249 U.S. 557 (1919); *Leedom* v. *Kyne,* 358 U.S. 184 (1958); *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), and *Gardner* v. *Toilet Goods Assn,* 387 U.S. 167 (1967); *Allen* v. *Grand Central Aircraft Co.,* 347 U.S. 535 (1954) (determining the merits of plaintiff's contention that the time for action against it had expired); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963) (holding that the National Labor Relations Act did not extend to the situation in controversy; *Deering Milliken, Inc.* v. *Johnston,* 295 F.2d 856, 861 (4th Cir. 1961); *Adler* v. *United States,* 136 F.Supp. 956, 957-958 (Ct. Cl. 1956). While this power is not to be exercised without sound reasons, the exercise of this power is not in derogation of the administrative process, and where, as in this case, the absent parties will be bound, and their contractual rights jeopardized, by the administrative proceedings, judicial intervention is required to remedy defects which would nullify the entire proceedings.

However, the Court of Appeals below failed to take account of this Court's frequent instruction that exercise of the federal courts' power to intervene in agency proceedings is to be flexibly applied. Thus,

> ... the contention that the rigors of the exhaustion doctrine should be relaxed is not to be met by mechanical recitation of the broad interests usually served by the doctrine, but rather should be assessed in light of *discrete analysis* of the particular default in question .... *McGee* v. *United States,* 402 U.S. 479, 485 (1971) (emphasis supplied).

The Court of Appeals mistakenly believed that there exist merely a few specific exceptions to the rule against review prior to exhaustion of all administra-

tive remedies and that petitioner needed, but failed, to bring itself within one of these enumerated exceptions. Thus, having observed that "Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings" (App. 4a) the Court of Appeals looked no farther to determine the appropriateness of judicial intervention. Instead, the court should have assessed the controlling underlying factors, viz. whether the seriousness of the defects in the FTC proceeding mandated judicial intervention, whether this was an issue which it could have resolved without excessive disruption of the administrative process, and whether in the absence of judicial intervention at this stage there will later be available other adequate relief. *Amos Treat & Co.* v. *Securities & Exchange Commission,* 306 F. 2d 260 (D.C. Cir. 1962); *Jewel Companies, Inc.* v. *FTC,* 432 F. 2d 1155 (7th Cir. 1970).

In contrast to the Eighth Circuit's rigid approach is the pragmatic analysis reflected in the dissenting opinion of Judge Medina in *PepsiCo, Inc.* v. *Federal Trade Commission,* 472 F.2d 179, (2d Cir. 1973) (dissenting opinion), *pet. for cert.* filed April 19, 1973. Judge Medina outlined a variety of reasons why "[i]t is not in the interest of justice that determination of these questions be postponed until the entire proceeding is concluded, especially as these questions are ripe for decision now." *Id.* at 193. In summary, these reasons which are equally pertinent in the instant case, are as follows: (1) the ruling of the Commission is final; (2) valuable property and contract rights of the bottlers are involved; (3) the bottlers' rights to intervention are inadequate and illusory; (4) it is unreasonable to accept the risk that the entire proceeding

will ultimately need to be repeated when this risk can be avoided by making the bottlers parties; (5) failure to join the bottlers in the hearing raises constitutional issues.

In concluding that the district court should not exercise jurisdiction, the Court of Appeals below did not even consider the principal reason for judicial intervention at this stage. Immediate judicial intervention is required to remedy a defect which would otherwise fundamentally taint the FTC proceedings, for failure to join indispensable parties inflicts upon the proceedings a fundamental defect of constitutional proportions. *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1854); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961). This doctrine, now embodied in Rule 19 of the Federal Rules of Civil Procedure, "is still valid today." *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 124 (1968).[5]

The underlying rationale of the doctrine was explained long ago in *Gregory* v. *Stetson:*

> The rule as to who shall be made parties to a suit in equity is thus stated in Story's Eq. Pl., sec. 72: "It is a general rule in equity . . . *that all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, however numerous they may be, so that there may*

[5] In the analogous context of requests for intervention, courts have exercised jurisdiction to determine whether administrative proceedings should be allowed to continue without the absent parties. Railroad Trainmen v. Baltimore & Ohio R. Co., 331 U.S. 519 (1947); Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960); American Communications Association v. United States, 298 F.2d 648 (2d Cir. 1962).

> *be a complete decree, which shall bind them all. By this means, the court is enabled to make a complete decree between the parties, to prevent future litigation by taking away the necessity of suits, and to make it perfectly certain that no injustice is done, either to the parties before it or to others, who are interested in the subject matter, by a decree, which might otherwise be grounded upon a partial view only of the real merits.* When all the parties are before the court, the whole case may be seen; but it may not, where all the conflicting interests are not brought out upon the pleadings by the original parties thereto." See also 1 Daniell's Ch. Pl. and Pr. 246 *et seq.* (Emphasis added.) 133 U.S. at 586.

The indispensable party doctrine is a basic public policy, which should not be lightly cast aside. This doctrine has long been applied in antitrust cases and is perfectly consistent with antitrust objectives. See *United States* v. *Standard Oil Co. of New Jersey,* 152 Fed. 290 (E.D. Mo. 1907), *aff'd* 221 U.S. 1 (1911); *Fruit Growers' Express Inc.* v. *FTC,* 274 Fed. 205 (7th Cir. 1921), dismissed by stipulation on motion of Solicitor General, 261 U.S. 629 (1923); *Sinclair Refining Co.* v. *FTC,* 276 Fed. 686 (7th Cir. 1921), *aff'd* 261 U.S. 463 (1923); *United States* v. *Northern Pac. R. Co.,* 134 Fed. 715 (8th Cir. 1905); *United States* v. *Hearst Corporation,* — F.Supp. — (S.D. N.Y. 1972).[6]

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[6] In most of the antitrust cases in which absent parties were held not to be indispensable parties, the restrictions under challenge were solely for the benefit of defendants, not the absent parties. National Licorice Co. v. NLRB, 309 U.S. 350 (1940); United States v. United Shoe Machinery Co., 258 U.S. 451 (1922); Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952), rev'd in part, 346 U.S. 61 (1953). In other cases, the absent party was not required because the defendant was the creature of, or under the control of, absent parties. E.g., Gray Line, Inc. v.

The FTC's position that the indispensable party doctrine must give way to the needs of antitrust enforcement is unfounded and mistakenly assumes incompatibility between these two public policies. The FTC has never shown why the bottlers cannot be joined in this proceeding, and indeed the Commission has recently joined several hundred members of another industry in another action brought by it. *In the Matter of the Society of the Plastics Industry, Inc.*, announced May 30, 1973. Obviously, if the FTC can prosecute a complaint against a class of plastics manufacturers, there is no apparent obstacle to a class suit against the bottlers. Further, the Administrative Law Judge's statement that he would permit the intervention of any bottlers wishing to participate as intervenors demonstrates that joinder of the absent bottlers is feasible. In sum, the Commission's position unnecessarily subverts the indispensable party doctrine, a factor which the Court of Appeals did not adequately consider.

Judicial intervention is also proper because the instant case involves a purely legal issue without any disputed facts. The existence and terms of the franchise agreements are not in dispute. The importance of the territorial provisions to the bottlers and the substantial injury resulting from elimination of the territories are not in dispute. The appropriateness of judicial review in such instances is increased where

Gray Line Sightseeing Companies Assoc., Inc., 246 F.Supp. 495 (N.D. Calif. 1964); United States v. Nationwide Trailer Rental System, Inc., 156 F.Supp. 800 (D. Kan. 1959), aff'd. 355 U.S. 10 (1957). In United States v. National Lead Co., 63 F.Supp. 513 (S.D. N.Y. 1945), aff'd 332 U.S. 319 (1947), the absent parties were foreign members of a world cartel, and a joinder requirement would have defeated the court's jurisdiction.

"[the] question raised is inherently a legal one and does not involve any factual determinations." *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970). See also, *McKart* v. *United States*, 395 U.S. 185, 205-6 (1969); *Elmo Division of Drive-X Company* v. *Dixon*, 348 F.2d 342, 347 (D.C. Cir. 1965).

In deciding this case, the District Court would not have substituted itself for the Commission as the fact-finder on the issues in the Commission's complaint against plaintiff. As noted, the issue before the District Court was a purely legal issue, and one wholly distinct from the issues raised by the FTC complaint. This Court observed in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), in upholding the jurisdiction of the District Court to grant injunctive and declaratory relief without exhaustion of administrative remedies:

> [W]e believe the issues presented are appropriate for judicial resolution at this time. First, all parties agree that the issue tendered is a purely legal one: whether the statute was properly construed by the Commissioner. . . . 387 U.S. at 149.

Judicial intervention in the instant case is also appropriate because by any practical standard the Commission's action is final on the joinder issue, as the Court of Appeals acknowledged. (5a) The indispensable party issue was formally presented to, and ruled upon by, the Administrative Law Judge and the Commission. Neither the Administrative Law Judge nor the Commission suggested that further proceedings might cause them to change their holdings. Indeed, the profound impact of the FTC proceedings upon the bottlers has been acknowledged by the Administrative Law Judge. (21a)

As this Court has taught, "The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Laboratories* v. *Gardner, supra,* at 149-50. Thus, "The test of finality for purposes of review is not whether the order is the last administrative order contemplated by the statutory scheme, but rather whether it imposes an obligation or denies a right with consequences sufficient to warrant review." *Environmental Defense Fund, Inc.* v. *Ruckelshaus,* 439 F.2d 584, 589 fn. 8 (D.C. Cir. 1971). In this regard, it is pertinent that

> The "final agency action" made reviewable under § 10(c) of the Administrative Procedure Act need not necessarily be read as synonymous with "a final order of the Board granting or denying in whole or in part the relief sought . . ." made reviewable under § 10(f) of the National Labor Relations Act. " 'Finality' is not . . . a principle inflexibly applied." *Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856, 865 (4th Cir. 1961).[7]

Under the foregoing authorities, it is clear that the Commission's ruling in the instant matter constitutes

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[7] The Court of Appeals for the Fourth Circuit pointed out that both committees of the House and Senate included in their reports on the Administrative Procedure Act a statement that final action includes any effective agency action for which there is no other adequate remedy in court.

> It is true that no such definition of "final action" was included in the Act, itself, but the provision of § 10(e) authorizing the courts to compel agency action unreasonably delayed, makes it plain that the word was used in that sense in § 10(c) . . . . When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, the delay is final agency action for which § 10 of the Administrative Procedure Act does provide an effective remedy. 295 F.2d at 865-866.

final action. As Judge Medina observed in the *Pepsi-Co.* decision: "Every effort to persuade the FTC to join these indispensable parties and thus afford them proper and reasonable notice and an effective hearing has failed." 472 F.2d at 193. In the words of the court in *Environmental Defense Fund,* the Commission's ruling "denies a right with consequences sufficient to warrant review." 439 F.2d at 589, fn. 8.

The only reasons adduced by the FTC for denying joinder of the bottlers are considerations of administrative ease in the handling of this case and in restructuring the soft drink industry. However, if the bottlers' contract rights are destroyed in their absence from this proceeding, petitioner will be faced with the prospect of inconsistent demands and multiple lawsuits by the bottlers. Such conflicts are certain, if the "Metro Area Bottler Handicap" is imposed by the Commission, for that proposal would create two adverse classes of bottlers, some of whose contract rights would be eroded for the benefit of the others. The only beneficiary of such an approach will be the Commission, which will sit on the sidelines while the bottlers, petitioners, and the courts try to sort out the changed contractual relationships in the course of many lawsuits. To attempt to impose on petitioner an Order abrogating and altering contractual rights without any assurance that it will not be subjected to multiple litigation by bottlers not parties to this proceeding denies it due process. *Western Union Tel. Co.* v. *Pennsylvania, supra,* at 75.

The government has contended that, even if the bottlers are indispensable parties and should be joined in the FTC proceeding, petitioners will suffer only

the burden of a duplicative proceeding. On the contrary, failure to join indispensable parties at this stage inflicts irreparable injury because, after protracted Commission proceedings, the indispensable party issue will be subjected to a different and more stringent standard of review.[8] As this Court pointed out in *Provident Tradesmens Bank and Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), one of the criteria for determining the indispensable character of a party is

> . . . the importance, if any, of the fact that a judgment, binding on the parties although not binding on [the non-party], had already been reached *after extensive litigation*[.] *Id.* at 109. (emphasis supplied.)

Likewise, in *Jewel Companies, Inc.* v. *FTC,* 432 F.2d 1155 (7th Cir. 1970), which raised the question of whether one of the Commissioners had misconstrued his statutory obligation in authorizing the proceedings, the court upheld the propriety of judicial review before the proceedings were completed because of the more stringent review which would be imposed after trial:

> If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, *the standard of review will be different.* At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint. As in *Skinner & Eddy,* "the so-called administrative remedy was without relevance to the plaintiff's claim." 432 F.2d at 1159 (emphasis supplied).

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[8] The Court of Appeals rejected this contention in a bare footnote comment without citation or other support. (5a)

CONCLUSION

The Federal Trade Commission's action in denying petitioner's request for joinder of the bottlers or dismissal of the complaint unnecessarily and arbitrarily disregards the well-established doctrine of indispensable parties. The Commission took this action in the knowledge of the serious disruption to the soft drink industry that will attend these proceedings. The instant action, then, presented the federal courts with an issue clearly warranting and requiring prompt judicial remedy. Nonetheless, the courts below held erroneously that the federal courts are powerless to intervene in such a situation.

Wherefore, the petition should be granted.

Respectfully submitted,

EARL W. KINTNER
MARK R. JOELSON
EUGENE J. MEIGHER
I. C. WADDEY, JR.
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APPENDIX A

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1680

September Term, 1972

THE SEVEN-UP COMPANY, a corporation of the State of Missouri, *Appellant,*

vs.

ANDREW C. GOODHOPE, Hearing Examiner; MILES W. KIRKPATRICK, Chairman; PAUL RAND DIXON, Member; A. EVERETTE MACINTYRE, Member; MARY GARDINER JONES, Member; DAVID S. DENNISON, JR., Member, and The Federal Trade Commissioner, *Appellees.*

Appeal from the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 31, 1973

Costs taxed in favor of Appellees:

Costs of printing 25 copies of Appellees' brief: $208.23.

Total costs of Appellees for recovery from Appellant in the U.S. District Court, $208.23.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, 8th Circuit
ROBERT C. TUCKER

June 26, 1973

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1680

Appeal from the United States District Court of the Eastern District of Missouri.

THE SEVEN-UP COMPANY, *Appellant*,

vs.

Federal Trade Commission, MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., ANDREW C. GOODHOPE, Administrative Law Judge, *Appellees*.

Submitted April 12, 1973
Filed May 31, 1973.

Before LAY and STEPHENSON, Circuit Judges, and TALBOT SMITH, District Judge.*

STEPHENSON, Circuit Judge.

The Seven-Up Company appeals from the order of the District Court dismissing appellant's claim for lack of subject matter jurisdiction. Seven-Up sought below to enjoin the Federal Trade Commission from further action in its proceedings against Seven-Up, alleging that the administrative proceeding itself is fatally defective without the joinder of Seven-Up's 470 bottlers as indispensible parties.

Seven-Up, along with several other major soft drink manufacturers,[1] has been charged by the FTC with using

* Eastern District of Michigan, sitting by designation.

[1] The manufacturers were charged in separate complaints.

an unfair method of competition through its license agreement with bottlers whereby the bottlers agree not to sell outside of designated geographical areas. Seven-Up moved to dismiss the administrative complaint, claiming that the bottlers are indispensible parties since they have important contract rights which are at stake in the proceedings. The motion to dismiss was denied by the Hearing Examiner whose order was then upheld by the Commission.[2] Seven-Up then petitioned the District Court for both injunctive and declaratory relief.

The Coca-Cola Company and PepsiCo., Inc., other respondents in the FTC proceedings, have both unsuccessfully presented the identical claim to the Fifth and Second Circuits. *The Coca-Cola Company* v. *FTC*, —F.2d— (CA5 No. 72-2270 February 15, 1973) and *PepsiCo., Inc.* v. *FTC*, 472 F.2d 179, (CA2 1972). We particularly agree with the reasoning of the Fifth Circuit and likewise hold that the action was properly dismissed for lack of subject matter jurisdiction.

Federal Courts have traditionally declined to interfere with on-going agency proceedings under the doctrine requiring exhaustion of administrative remedies. See, *McGee* v. *United States*, 402 U.S. 479 (1971); *McKart* v. *United States*, 395 U.S. 185 (1969) and *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (1938). Furthermore, Congress has here specified a statutory scheme which contemplates judicial review of cease and desist orders issued

---

[2] While we do not reach the merits of the indispensible party issue, we note that joinder question also contains a dispute as to the underlying facts. The Hearing Examiner allowed any of the 470 bottlers to intervene if they so wished. One intervened. Seven-Up, however, asserts that this right to intervene was "limited" and insufficient. The FTC disagrees. *See, e.g., PepsiCo., Inc. 1. F.T.C.*, 472 F.2d 179, 183-184 (CA2 1972).

by the FTC exclusively by a court of appeals. 15 U.S.C. §§45(c) and (d) provide in pertinent part that:

> (c) Any person, . . . required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, ...
>
> (d) . . . the jurisdiction of the court of appeals . . . shall be exclusive.

This is fully in harmony with § 10(c) of the Administrative Procedure Act. See 5 U.S.C. § 704 and *Coca Cola, supra,* at Slip Op. 4.

The statutory provisions for review, however, have been held not to preclude district court review under *all* circumstances. *See Elmo Division of Drive-X Co.* v. *Dixon,* 348 F.2d 342, 343 (CA D.C. 1965) and *PepsiCo, supra,* at 185. *Compare, Coca-Cola, supra,* at Slip Op. 4-5. It has been held that district courts have jurisdiction to grant relief during agency proceedings which are not yet final in certain specific instances. These include, (1) where agency has acted in excess of its delegated powers or contrary to a specific statutory mandate. *Leedom* v. *Kyne,* 358 U.S. 184 (1958); (2) where the proceedings involve questions of high national interest because of their international complexion. *McCulloch* v. *Sociedad Nacional de Marineros de Hondursa,* 372 U.S. 10 (1963) and (3) where the agency has clearly violated the constitutional rights of the party seeking prior restraint. *Fay* v. *Douds,* 172 F.2d 720 (CA2 1949). Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings.

Seven-Up further asserts, however, that the FTC's refusal to join the bottlers as parties in its proceedings amounts to "final agency action for which there is no other adequate remedy in court" under the Administrative

Procedure Act. 5 U.S.C. § 704. We disagree, for while the Commission's ruling on Seven-Up's motion at the most amounts to final agency action on the joinder issue, judicial review by a court of appeals can clearly be had once the Commission's proceedings are concluded. 5 U.S.C. § 704 goes on to provide that an interlocutory agency ruling is "subject to review on the review of the final agency action." Neither are we convinced that the absence of the bottlers as parties renders the proceedings so fundamentally defective that immediate judicial relief is required. As the Fifth Circuit stated *Coca-Cola,* at *Slip Op.* 8-9.

> The extraordinary remedy of judicial intervention in agency proceedings still in process is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

We conclude that Seven-Up must await a cease and desist order by the FTC, if such is ever to be issued, before jurisdiction will lie for a review of the interlocutory ruling it challenges.[3]

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[3] We reject as without merit Seven-Up's contention that the standard of review on the joinder question, once the agency proceedings are completed, will necessarily be more stringent.

Affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

THE SEVEN-UP COMPANY, a corporation of the State of Missouri, *Plaintiff*

vs.

ANDREW C. GOODHOPE, Hearing Examiner; MILES W. KIRKPATRICK, Chairman; PAUL RAND DIXON, Member; A. EVERETTE MACINTYRE, Member; MARY GARDINER JONES, Member, and THE FEDERAL TRADE COMMISSION, *Defendants.*

No. 72 C 285 (2)

Order

Presently pending before the Federal Trade Commission is a proceeding charging plaintiff, a soft drink manufacturer, with engaging in unfair methods of competition in violation of the Federal Trade Commission Act, 15 U.S.C., Section 45, by reason of provisions in licenses granted to its bottlers whereby the bottlers agree not to sell the product outside of a designated geographical territory. Similar complaints were filed and are pending against other soft drink manufacturers, including Coca Cola and Pepsi Cola. Plaintiff moved to dismiss the Commission proceedings on the ground of non-joinder of plaintiffs' many bottlers as indispensable parties.

This action for injunctive and declaratory relief challenges the proprietary of the interlocutory order of the Commission denying the motion to dismiss. Similar orders in the Coca Cola and Pepsi Cola proceedings have been unsuccessfully attacked in other United States District Courts. See *The Coca-Cola Company* v. *Federal Trade*

Commission, Northern District of Georgia, 342 F.Supp. 670, and *PepsiCo, Inc.* v. *Federal Trade Commission,* Southern District of New York, 343 F.Supp. 396. Appeals have been taken from both rulings.

Defendants have moved to dismiss, or in the alternative for summary judgment. Plaintiff has moved for summary judgment. After full consideration, we agree with the rationale of the district court rulings in the Coca Cola and Pepsi Cola cases dismissing the complaints therein for lack of subject matter jurisdiction.

Accordingly, IT IS HEREBY ORDERED that the defendants' motion to dismiss be and the same is hereby SUSTAINED and the complaint is dismissed for lack of subject matter jurisdiction. Plaintiff's motion for summary judgment is denied.

Dated this 12th day of September, 1972.

United States District Judge
Signature Unreadable

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

DOCKET No. 8853

In the Matter of
CRUSH INTERNATIONAL LIMITED, a corporation;
BEVERAGES INTERNATIONAL INC., a corporation;
CRUSH INTERNATIONAL INC. a corporation.

DOCKET No. 8854

In the Matter of
DR. PEPPER COMPANY, a corporation.

DOCKET No. 8855

In the Matter of
THE COCA-COLA COMPANY, a corporation;
COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS (THOMAS), INC.,
a corporation; and
COCA-COLA BOTTLING WORKS 3rd, Inc., a corporation.

DOCKET No. 8856

In the Matter of
PEPSICO, INC., a corporation

DOCKET No. 8857

In the Matter of
THE SEVEN-UP COMPANY, a corporation.

DOCKET No. 8859

In the Matter of
NATIONAL INDUSTRIES INC., a corporation; and
COTT CORPORATION, a corporation.

Order Ruling on Motions to Dismiss for Failure to Join Indispensable Parties

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853-8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complain counsel's reply, filed February 29, 1972.[1] Although the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

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[1] The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat as certified February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motions to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; Pepsico, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motions to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for prmission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than substance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case Docket No. 8672 Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 17,965. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> "The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commis-

sion with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination." at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave to File Interlocutory Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremount Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 18,542. There we held as follows:

"Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his

jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified." at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their contracts and hence due process requires that they be made a party so that they may be bound by the outcome

of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

> "It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.
>
> "As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers." Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispendable Parties, January 7, 1972, pages 3-4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v.

Patterson, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE'S FEDERAL PRACTICE, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.* v. *F.T.C.*, 274 F. 205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.* v. *F.T.C.*, 276 F. 686 (7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commission's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp. v. U.S.*, 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lasky*

Corp., 282 U.S. 30 (1930); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); *U.S.* v *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶ 19,485 in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> "It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accordance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not clearly of benefit to said other parties." Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties. In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstand-

ing contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such a eventuality is highly unlikely. A contract which has been decleared illegal cannot be enforced by either party.

> "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. . . ." *Restatement of Contracts,* Section 598 (1932).

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into. *Restatement of Contracts,* Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> "Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." 6 *Williston on Contracts,* Section 193 (Rev. Ed., 1938).

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical

framework for the disposition of related issues. Rule 19(a) provides that:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

As to (1), it is clear that depending on the outcome, complete relief can be accorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, — U.S. —, 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have

mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g. Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Schields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (5th Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F.796 (D.Del. 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an affect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

It Is Ordered that the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

By the Commission.

/s/ Charles A. Tobin
Charles A. Tobin
Secretary

SEAL
Issued: March 23, 1972

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 8857

In the Matter of
THE SEVEN-UP COMPANY, a corporation

Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties

Respondent by its counsel, has filed a motion to dismiss the complaint for nonjoinder of its 470 bottlers, all of whom it contends are indispensable parties to this proceeding. Respondent alleges that pursuant to the provisions of its exclusive bottling appointment agreements, each of respondent's bottlers has acquired the exclusive right in a defined territory to bottle and distribute soft drinks sold under respondent's registered trademarks. Respondent asserts that in reliance on these agreements its bottlers have invested many millions of dollars over the years in plants equipment and distribution facilities for the manufacture and sales of respondent's products and in creating, developing and maintaining markets for such products. The respondent asserts that its bottlers have each acquired a valuable vested property right in such contract provisions which have heretofore been recognized as lawful and reasonable ancillary restraints accompanying valid trademark licenses and that to invalidate such provisions would result in many of the bottlers being forces out of business and deprived of valuable investments and property rights and would constitute a denial of due process of law to respondent and to each of its bottlers.

Counsel in support of the complaint have filed an answer opposing the respondent's motion to dismiss.

Counsel for the respondent and in support of the complaint agree that while the Federal Rules of Civil Pro-

cedure are not binding upon the hearing examiner of the Commission, Rule 19 of such Rules supplies a practical framework within which to arrive at a decision on the questions presented by the respondent's motion.

Rule 19, in pertinent part, provides as follows:

"Rule 19. *Joinder of Persons Need for Just Adjudication*

"(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
of the action improper, he shall be dismissed from the action.

"(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can

be lessened or avoided; third, whether a judgment rendered in a person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." 28 U.S.C.A. 19 (1971 Cum. Annual Pocket Part).

It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondent's trademarked products, it would be without recourse to sue the respondent for damages or for injunctive relief requiring it to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding. In the first place, the large number of them (470) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers.

In *Provident Bank* v. *Patterson,* 390 U.S. 102 (1967), the Supreme Court considered the present revised Rule 19. In that case, after a verdict had been obtained in the District Court, the Circuit Court of Appeals dismissed the action on the ground that an indispensable party had not been made a party to the action. The question of indispensable parties was raised for the first time in the Circuit Court of Appeals. The Supreme Court reversed, since the Circuit Court failed to "follow the provision of Rule 19 of the Federal Rules of

Civil Procedure that findings of 'indispensability' must be based on stated pragmatic considerations." (at p. 106) The Supreme Court held that the question of indispensable party was not a substantive right unaffected by the Federal Rules of Civil Procedure. The Court pointed out that the principal consideration is whether or not it is "feasible" to join a party and that the decision of whether or not to join a party pursuant to Rule 19 requires the applying of the equity and good conscience test of Rule 19(b) (at p. 109).

In a number of antitrust cases, it has been recognized by the Supreme Court that the courts possess the power to strike down "systems deemed violative of the anti-trust laws even though such systems include leases, licenses, and other forms of agreements, and the lessees, licensees, and other parties to the agreements (are) not before the Court." *U.S.* v. *National Lead Co.*, 63 F. Supp. 513, 525, n. 8 (S.D.N.Y. 1945), affirmed, 332 U.S. 319 (1947). See also, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940).

Consequently,

It Is Ordered that the respondent's motion to join all of its bottlers as being indispensable parties to this proceeding is hereby denied.

/s/ Andrew C. Goodhope
Andrew C. Goodhope
Hearing Examiner

January 21, 1972

APPENDIX E

Constitutional Provisions, Statutes and Rules Involved

UNITED STATES CONSTITUTION

AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

JUDICIAL CODE

28 U.S.C. §1331(a). Federal question; amount in controversy; costs

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. §1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. §1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer

or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

FEDERAL TRADE COMMISSION ACT

15 U.S.C. §45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requir-

ing a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provided that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person or advertising offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in

paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding, by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon

good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act of practice in question was used or where such person, partnership, or corporation resides or carried on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court of the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such

terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the resi-

dence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the Court of Appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the Court of Appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such peition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate," in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action

brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect shall be deemed a separate offense.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he had not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judg-

ment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reason for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

FEDERAL TRADE COMMISSION

RULES OF PRACTICE

16 C.F.R. §3.22. Motions

(a) Presentation and disposition. During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under §3.42(g), shall be addressed to the Administrative Law Judge, and if within his authority shall be ruled upon by him. Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation. All written motions shall be filed with the Secretary of the Commission and all motions addressed to the Commission shall be in writing.

(b) Content. All written motions shall state the particular order, ruling, or action desired and the grounds therefor.

(c) Answers. Within ten (10) days after service of any written motion, or within such longer or shorter time as may be designated by the Administrative Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked

for in the motion. The moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission.

(d) Motions for extensions. As a matter of discretion, the Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time, and may rule upon such motions ex parte.

(e) Rulings on motions for dismissal. When a motion to dismiss a complaint or for other relief is granted with the result that the proceeding before the Administrative Law Judge is terminated, the Administrative Law Judge shall file an initial decision in accordance with the provision of §3.51. If such a motion is granted as to all charges of the complaint in regard to some, but not all, of the respondents, or is granted as to any part of the charges in regard to any or all of the respondents, the Administrative Law Judge shall enter his ruling on the record and take it into account in his initial decision. When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case, the Administrative Law Judge may, if he so elects, defer ruling thereon until the close of the case for the reception of evidence.

16 C.F.R. §3.23. Interlocutory appeal

Rulings of the hearing examiner on motions may not be appealed to the Commission prior to appeal from the initial decision except in the following circumstances:

(a) *Appeals without a determination by the hearing examiner.* The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the hearing examiner: (1) Requires the disclosure of Commission records or the appearance of an official or employee of the Com-

mission pursuant to §3.36; (2) requires the appearance of other Government officials pursuant to §3.37; (3) suspends an attorney from participation in a particular proceeding pursuant to §3.42(d); or (4) grants or denies an application for intervention pursuant to the provisions of §3.14. Appeal from such a ruling may be sought by filing with the Commission an application for review, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's ruling. Answer thereto may be filed within five (5) days after service of the application for review. The application for review should specify the person or party taking the appeal; should designate the ruling or part thereof from which appeal is being taken; and should specify under which provisions hereof review is being sought. The Commission upon its own motion may enter an order staying the return date of an order issued by the hearing examiner pursuant to §3.36 or §3.37 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

(b) *Appeals upon a determination by the hearing examiner.* Except as hereinbefore provided in paragraph (a) of this section applications for review of a ruling by the hearing examiner may be allowed only upon request made to the examiner and a determination by the examiner in writing, with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for defference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. Application for review in writing may be filed, not to exceed fifteen (15) pages, within five (5) days after notice of the hearing examiner's determination. Answer thereto may be

filed within five (5) days after service of the application for review. The Commission may thereupon, in its discretion, permit an appeal. Commission review, if permitted, will be confined to the application for review and answer thereto, without oral argument or further briefs, unless otherwise ordered by the Commission.

(c) *Proceedings not stayed.* Application for review and appeal hereunder shall not stay proceedings before the hearing examiner unless the examiner or the Commission shall so order.

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No. 73-337

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In the Supreme Court of the United States

OCTOBER TERM, 1973

THE SEVEN-UP COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

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THE SEVEN-UP COMPANY, PETITIONER

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FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This a companion case to *PepsiCo, Inc.* v. *Federal Trade Commission, et al.* (No. 72-1420), *Pepsi-Cola Bottling Company of Corvallis, Inc.* v. *Federal Trade Commission, et al.* (No. 72-1422), and *The Coca-Cola Company, Coca-Cola Bottling Co., et al.* v. *Federal Trade Commission* (No. 72-1504), now pending on petitions for writs of certiorari. The question presented by this case—whether the courts properly refused to enjoin the Federal Trade Commission from conducting an administrative proceeding because of the agency's failure to include as respondents allegedly indispensable parties—is identical to the questions presented in the above petitions. In this case, the Court of Appeals for the Eighth Circuit held, as had the Fifth and Second Circuits in the above cases, that the complaint

was properly dismissed for lack of subject matter jurisdiction.

Our reasons for opposing the granting of this petition are fully set forth in our Memorandum for the Respondents in Opposition in Nos. 72-1420, 72-1422 and 72-1504, to which we respectfully refer this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.